Cosway (M) Sdn Bhd & Anor v Gan Poh Im

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P–04–72 OF 2001
ABDUL MALEK AHMAD PCA, ARIFIN ZAKARIA AND TENGKU BAHARUDIN SHAH JJCA
27 JANUARY 2005

Civil Procedure — Appeal — Memorandum of appeal — Filing of — Extension of time — Whether 14 days from receipt of Form 141 prescribed to file memorandum of appeal was mandatory — Whether court had discretion to extend time — Whether mistake of solicitors sufficient ground to grant extension of time — Whether respondent prejudiced by non compliance — Rules of the High Court 1980 O 3 r 5(1) & O 55 r 2

Civil Procedure — Appeal — Memorandum of appeal — Filing of — Whether memorandum filed together with the appeal record without payment of filing fees was defective — Subordinate Courts Rules 1980 O 49 r 3A(1)

Civil Procedure — Appeal — Memorandum of appeal — Filing of — Whether memorandum must be filed within 14 days or 6 weeks from the receipt of Form 141 — Subordinate Courts Rules 1980 O 49 rr 3, 3A — Rules of the High Court 1980 O 55 r 2(1)

The learned sessions court judge had given judgment in favour of the respondent. On 19 February 1998, the appellants filed their notice of appeal. Form 141 was issued by the sessions court on 9 April 1998. On 21 May 1998, the appellants filed the appeal record incorporating the memorandum of appeal dated 18 May 1998. On 8 October 1998, the appellants filed the same memorandum of appeal with the prescribed filing fee. The repondent's solicitors gave notice of preliminary objection on the ground that the memorandum of appeal was filed out of time. By notice of motion dated 25 May 1999, the appellants applied for extension of time to file and serve the memorandum of appeal. The learned High Court judge dismissed the notice of motion and allowed the preliminary objection of the respondent. The appellants appealed, submitting that the delay in filing of the memorandum of appeal was due to the ambiguity and uncertainty as to whether the memorandum of appeal had to be filed separately within 14 days from the receipt of Form 141 or whether it had to be filed together with the appeal record within 6 weeks from the receipt of Form 141.

Held, allowing the appeal and granting the appellant extension of time to file and serve the memorandum of appeal:

(1) The memorandum of appeal was filed twice, once together with the appeal record which was filed on 21 May 1998, and the second time it was filed separately on 8 October 1998. However in view of the fact that no requisite filing fees was paid with regard to the first memorandum of appeal, on that

ground alone, it was defective and ought not to be considered by the court (see para 3). Further, O 49 r 3A(1) of the Subordinate Courts Rules 1980 ('the SCR') clearly does not require the memorandum of appeal to be included in the appeal record, therefore, it was no excuse for the appellants to file the memorandum of appeal together with the appeal record. Apart from that, the prescribed time for the filing of the appeal record is six weeks from the service of Form 141 whereas the prescribed time for filing of the memorandum of appeal as provided in O 55 r 2(1) of the Rules of the High Court 1980 ('the RHC') is 14 days from the date of service of Form 141 (see para 4). Thus, the application for extension of time for the filing of the memorandum of appeal could only be considered in relation to the second memorandum of appeal filed on 8 October 1998 (see para 5).

(2) Having examined O 49 rr 3 and 3A of the SCR and O 55 r 2(1) of the RHC, it was clear that the memorandum of appeal must be filed within 14 days from the receipt of Form 141 (see para 10); *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 and *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 followed; *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170 and *Shaile bin Ahmad v Hajjah Fatimah bte Ahmad & Ors* [1991] 3 CLJ 2217 not followed. On that premise, O 55 r 2(1) of the RHC on its proper construction admits of no ambiguity (see para 10). In any event in the present case, the delay in filing the second memorandum of appeal was not in any way attributed to the alleged ambiguity. The delay in filing the memorandum of appeal arose purely out of the mistake of the appellants' solicitors in failing to file the memorandum of appeal separately from the appeal record as required by the rules (see para 11).

(3) Since the Rules Committee had removed the words 'or within such extended time as the court may allow' appearing in the original O 55 r 2 of the RHC, the 14 days prescribed under the present provision is a mandatory provision and has to be strictly complied with. The deletion of those words would not deprive the court of its discretion to extend time, for such a discretion is expressly conferred by O 3 r 5(1) of the RHC which deals with extension or abridgment of time specified in the rules. On that premise, under the present provision of O 55 r 2(1) of the RHC, the court still has the discretion to extend the time prescribed therein (see para 13).

(4) The Federal Court in *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 did not lay down the general rule that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal (see para 14).

(5) The non compliance was due to the mistake of the former solicitors of the appellants and the appellants were not at all to blame. In any event, the memorandum of appeal had been filed earlier together with the appeal record. Therefore, the respondent had notice of the grounds upon which the appellants are relying in the appeal. The same memorandum of appeal was filed again on 8 October 1998. In the circumstances, the respondent could not be said to have been seriously prejudiced by the non-compliance of the rule (see para 16).

(6) In the present case, the application was only for extension of time to file and serve the memorandum of appeal. The appeal record had been filed earlier within the stipulated time. Even the memorandum of appeal had been filed earlier together with the appeal record, albeit erroneously. After realising the error, the appellants' solicitors filed the memorandum of appeal out of time and this application, even though made after the notice of preliminary objection, was merely to regularise the filing and service of the memorandum of appeal. In the circumstances, the conduct of the appellants' solicitors could not be regarded as a blatant disregard of the rules of court. There was indeed a misapprehension of the rules of court but remedial steps were taken to comply with the rules. Moreover, there were merits in this appeal (see para 21).

[Bahasa Malaysia summary

Hakim mahkamah sesyen yang bijaksana telah memberi penghakiman yang berpihak kepada responden. Pada 19 Februari 1998, perayu telah memfailkan notis rayuan. Borang 141 telah dikeluarkan oleh mahkamah sesyen pada 9 April 1998. Pada 21 Mei 1998, perayu telah memfailkan rekod rayuan yang mengandungi memorandum rayuan yang bertarikh 18 Mei 1998. Pada 8 Oktober 1998, perayu telah memfailkan memorandum rayuan yang sama dengan yuran pemfailan yang diperlukan. Peguamcara responden telah memberi notis bantahan awal atas alasan bahawa memorandum rayuan telah difailkan di luar jangka masa. Melalui notis usul bertarikh 25 Julai 1999, perayu telah memohon lanjutan masa untuk memfailkan dan menyerahkan memorandum rayuan. Yang arif hakim Mahkamah Tinggi telah menolak notis usul tersebut dan membenarkan bantahan awal responden. Perayu telah merayu, dengan menyatakan bahawa kelewatan dalam memfailkan memorandum rayuan tersebut adalah diakibatkan oleh kesamaran dan ketidakpastian berkenaan dengan sama ada memorandum rayuan perlu difailkan secara berasingan dalam masa 14 hari daripada penerimaan Borang 141 atau sama ada ia perlu difailkan bersama dengan rekod rayuan dalam masa enam minggu daripada penerimaan Borang 141.

Diputuskan, membenarkan rayuan dan memberi lanjutan masa kepada perayu untuk memfailkan dan menyerahkan memorandum rayuan:

(1) Memorandum rayuan telah difailkan dua kali, sekali bersama dengan rekod rayuan yang telah difailkan pada 21 Mei 1998, dan kedua ianya difailkan secara berasingan pada 8 Oktober 1998. Walau bagaimana pun, memandangkan tiada yuran pemfailan telah dibayar bagi memorandum rayuan pertama, dan atas alasan itu sahaja, ianya adalah defektif dan tidak sepatutnya dipertimbangkan oleh mahkamah (lihat perenggan 3). Selain itu, A 49 k 3A(1) Kaedah-Kaedah Mahkamah Rendah 1980 ('KMR') dengan jelasnya tidak menghendaki memorandum rayuan untuk dimasukkan dalam rekod rayuan, oleh itu, tiada alasan bagi perayu untuk memfailkan memorandum rayuan bersama dengan rekod rayuan. Selain daripada itu, masa yang diperuntukkan untuk memfailkan rekod rayuan adalah enam minggu daripada penyampaian Borang 141 sementara masa yang diperuntukkan untuk

memfailkan memorandum rayuan seperti yang dinyatakan dalam A 55 k 2(1) Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') adalah 14 hari daripada tarikh penyampaian Borang 141 (lihat perenggan 4). Oleh itu, permohonan untuk lanjutan masa bagi memfailkan memorandum rayuan hanya boleh dipertimbangkan berkenaan dengan memorandum rayuan kedua yang difailkan pada 8 Oktober 1998 (lihat perenggan 5).

(2) Setelah meneliti A 49 k 3 dan 3A KMR dan A 55 k 2(1) KMT, adalah jelas bahawa memorandum rayuan perlu difailkan dalam masa 14 hari daripada penerimaan Borang 141 (lihat perenggan 10); *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 dan *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 diikut; *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170 dan *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors* [1991] 3 CLJ 2217 tidak diikut. Atas alasan itu, A 55 k 2(1) KMT dalam pembentukannya yang betul tidak mengandungi sebarang kesamaran (lihat perenggan 10). Walau bagaimana pun, dalam kes ini, kelewatan dalam memfailkan memorandum rayuan kedua tidak disebabkan oleh kesamaran yang dikatakan. Kelewatan dalam memfailkan memorandum rayuan terjadi disebabkan semata-mata oleh kesilapan peguamcara perayu kerana gagal untuk memfailkan memorandum rayuan secara berasingan daripada rekod rayuan sepertimana yang dikehendaki oleh kaedah-kaedah yang telah dinyatakan (lihat perenggan 11).

(3) Memandangkan Jawatankuasa Kaedah-kaedah telah membuang perkataan 'or within such extended time as the court may allow' yang asalnya tertera dalam A 55 k 2 KMT, maka 14 hari yang dinyatakan dalam peruntukan sekarang adalah satu peruntukan mandatori dan perlu dipatuhi dengan ketat. Pemotongan perkataan-perkataan ini tidak akan menyebabkan mahkamah hilang budi bicara untuk melanjutkan masa, kerana budi bicara sebegitu secara jelasnya diberikan oleh A 3 k 5(1) KMT yang memperkatakan tentang lanjutan atau penyingkatan masa yang dinyatakan dalam kaedah-kaedah. Atas alasan tersebut, di bawah peruntukan A 55 k 2(1) KMT sekarang, mahkamah masih mempunyai kuasa untuk menjalankan budi bicaranya untuk melanjutkan masa yang diperuntukkan (lihat perenggan 13).

(4) Mahkamah Persekutuan dalam *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129 tidak menyatakan peraturan umum bahawa kesilapan oleh peguamcara bukanlah alasan yang cukup untuk memberi lanjutan masa untuk memfailkan notis rayuan atau memorandum rayuan (lihat perenggan 14).

(5) Ketidakpatuhan itu adalah disebabkan oleh kesilapan bekas peguamcara perayu dan perayu langsung tidak bersalah. Walau bagaimana pun, memoramdum rayuan telah difailkan terlebih dahulu bersama dengan rekod rayuan. Oleh itu, responden mengetahui akan alasan yang digunakan oleh perayu dalam rayuan ini. Memorandum rayuan yang sama telah difailkan sekali lagi pada 8 Oktober 1998. Dalam keadaan ini, responden tidak boleh dikatakan telah diprejudiskan secara serius akibat daripada ketidakpatuhan kaedah itu (lihat perenggan 16).

(6) Dalam kes ini, permohonan hanyalah untuk lanjutan masa untuk memfailkan dan menyampaikan memorandum rayuan. Rekod rayuan telah difailkan lebih

awal dalam jangka masa yang telah ditetapkan. Malah, memorandum rayuan juga telah difailkan lebih awal bersama dengan rekod rayuan, walaupun secara salah. Selepas menyedari kesilapan itu, peguamcara perayu telah memfailkan memorandum rayuan di luar jangka masa dan permohonan ini, walaupun dibuat selepas notis bantahan awal, hanyalah untuk melazimkan pemfailan dan penyampaian memorandum rayuan. Dalam keadaan ini, kelakuan peguamcara defendan tidak boleh dikatakan sebagai satu sikap tidak mempedulikan kaedah-kaedah mahkamah secara terang-terangan. Memang terdapat salah faham terhadap kaedah-kaedah mahkamah tetapi langkah-langkah pemulihan telah diambil untuk mematuhi kaedah-kaedah. Tambahan pula, terdapat merit dalam rayuan ini (lihat perenggan 21).]

Notes

For cases on memorandum of appeal, see 2(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 1068–1080.

Cases referred to

Alloy Automative Sdn Bhd v Enkei Automative Co Ltd & Anor [1997] 3 MLJ 205 (refd)
Elayachee v Woo Siu Tip [1991] 3 MLJ 108 (folld)
Gan Hay Chong v Siow Kian Yuh & Anor (refd) [1975] 2 MLJ 129 (refd)
Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man [1990] 3 MLJ 45 (folld)
Joceline Tan Poh Choo & Ors v V Muthusamy (refd) [2003] 4 MLJ 494 (refd)
Karpal Singh Ram Singh v DP Vijandran [2001] 4 MLJ 161 (refd)
Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd [1990] 2 MLJ 170 (not folld)
Lee Guat Eng v Tan Lian Kim [1985] 2 MLJ 196 (refd)
Liew Yew Tiam & Ors v Cheah Cheng Hock & Ors [2001] 2 CLJ 385 (refd)
'Lung Yung'; The The 'Lune Yung' & 'Thai Yung' Owners & Ors v Sadit Timber Sdn Bhd & Ors [1984] 1 MLJ 29 (refd)
Md Amin Md Yusof & Satu Lagi lwn Cityvilla Sdn Bhd [2004] 4 MLJ 446 (refd)
Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd [1998] 2 MLJ 463 (refd)
Ratnam v Cumarasamy & Anor [1965] MLJ 228 (refd)
Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors [1991] 3 CLJ 2217 (not folld)
Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram [1998] 4 MLJ 297 (refd)
Vasudevan v T Damodaran & Anor [1981] 2 MLJ 150 (refd)

Legislation referred to

Rules of the High Court 1980 O 55 r 2(1)
Subordinate Courts Rules 1980 O 49 r 3A(1)

Appeal from: Civil Appeal No 12–19 of 1998 (High Court, Pulau Pinang)

V Sithambaram (Sitham & Associates) for the appellant.
N Shanmugam (Shan & Gooi) for the respondent.

Arifin Zakaria JCA (delivering judgment of the court):

[1] This action was commenced by the respondent/plaintiff in the sessions court against the appellants/defendants. At the conclusion of the trial, the learned sessions court judge gave judgment in favour of the respondent. On 19 February 1998, the appellants filed their notice of appeal. Form 141 was issued by the sessions court on 9 April 1998. On 21 May 1998, the appellants filed the appeal record incorporating the memorandum of appeal dated 18 May 1998. On 8 October 1998, the appellants filed the same memorandum of appeal with the prescribed filing fee. On 14 December 1998, the repondent's solicitors gave notice of preliminary objection on the ground that the memorandum of appeal was filed out of time. By notice of motion dated 25 May 1999, the appellants applied for extension of time to file and serve the memorandum of appeal. The notice of motion was heard by the learned High Court judge together with the appeal on 1 November 1999 whereby she dismissed the notice of motion and allowed the preliminary objection of the respondent. The appeal was dismissed with costs. The appellants now appeal against the said decision of the learned High Court judge.

[2] It is the contention of learned counsel for the appellants that the learned High Court judge had, in the circumstances of this case, erred in the exercise of her discretion in dismissing the appellants' application for extension of time to file the memorandum of appeal. It is settled law that the appellate court should be slow to interfere with the exercise of judicial discretion by the court below and secondly, there is a presumption that the court below has rightly exercised its discretion. For support, we would refer to the following authorities namely — *Ratnam v Cumarasamy & Anor* [1965] MLJ 228; *Vasudevan v T Damodaran & Anor* [1981] 2 MLJ 150; *The 'Lung Yung'; The 'Lune Yung' & 'Thai Yung' Owners & Ors v Sadit Timber Sdn Bhd & Ors* [1984] 1 MLJ 29. In *Ratnam v Cumarasamy*, Lord Guest expressed the view that: 'The court will not interfere unless it is clearly satisfied that the discretion has been exercised on a wrong principle and should have been exercised in a contrary way or that there has been a miscarriage of justice (*Evans v Bartlam*)'. Adopting the position in *Vasudevan v T Damodaran & Anor*, Abdoolcader FJ, in *The 'Lung Yung'* stated thus 'The exercise of judicial discretion by him is not to be lightly interfered with and there is a presumption that he has rightly exercised it …'. The appellate court will only intefere if it is satisfied that the judge in whom the primary discretion is vested has failed to take into account relevant (see *Paya Terubong Estates Sdn Bhd v Pusaka Warisan Sdn Bhd* [1998] 2 MLJ 463). Guided by the above stated principles, we will now consider the issues at hand.

[3] It is not in dispute that in the present case, the memorandum of appeal was filed twice, once together with the appeal record which was filed on 21 May 1998, and the second time it was filed separately on 8 October 1998. We agree with the learned counsel for the respondent that in view of the fact that no requisite filing fees was paid with regard to the first memorandum of appeal, therefore, on that ground alone, it is defective and ought not to be considered by the court.

[4] Further, O 49 r 3A(1) of the Subordinate Courts Rules 1980 ('SCR') clearly does not require the memorandum of appeal to be included in the appeal record, therefore, it is no excuse for the appellants to file the memorandum of appeal together with the appeal record. Apart from that, the prescribed time for the filing of the appeal record is six weeks from the service of Form 141 whereas the prescribed time for filing of the memorandum of appeal as provided in O 55 r 2(1) of the Rules of the High Court 1980 ('RHC') is 14 days from the date of service of Form 141.

[5] For the above reasons, we hold that the application for extension of time for the filing of the memorandum of appeal could only be considered in relation to the second memorandum of appeal filed on 8 October 1998.

[6] Both before us and in the court below, the learned counsel for the appellants contended that the delay in filing of the memorandum of appeal was due to the ambiguity and uncertainty as to whether the memorandum of appeal has to be filed separately within 14 days from the receipt of Form 141 or whether it has to be filed together with the appeal record within six weeks from the receipt of Form 141. The learned judge did not agree with the submission of counsel for the appellants. Her reasons are as follows:

> On this issue, upon careful consideration of the rules referred to, the authorities cited by counsel for the appellant as well as the respondent, I am of the view that the appellant's counsel was clearly wrong in arriving at such a conclusion. I hold that there are no conflicting provisions in the RHC and SCR as to the mode and the time frame for the filing of a memorandum of appeal after a full trial. On the contrary I am of the view that the mode and time frame to be observed as provided by RHC is crystal clear, unambiguous and is open to only one interpretation, and that is, that as submitted by the respondent's counsel. The rule to be observed in an appeal after a full trial is O 55 r 2 RHC (as amended by PU(A) 462/90 which came into force on 1 January 1991) and O 55 r 4(3) which is within 14 days from the date of service of the 141 Notice. I further hold that the appellants' counsel erred in relying inter alia, the Court of Appeal decision of *Yupapom* and *Kwong Yik Bank Bhd* as being relevant in the circumstances of this appeal. I am in agreement with the submission of counsel for the respondent that the confusion that exists is confined to interlocutory appeals and not to an appeal after a full trial. The delay that had led to the late filing of the memorandum of appeal is clearly attributable to a mistake or oversight on the part of the appellants' counsel himself.

[7] The learned counsel for the appellants contended that there arc two line of authorities which deal with the interpretation of O 49 r 3 of the SCR and O 55 r 2(1) of the RHC. In *Kuching Pharmacy Sdn Bhd v JL Morison Son & Jones (M) Sdn Bhd* [1990] 2 MLJ 170, Haidar J (as he then was) held that the appellant has six weeks from the date of receipt of Form 141 to file the memorandum of appeal. This case was followed by *Shafie bin Ahmad v Hajjah Fatimah bte Ahmad & Ors* [1991] 3 CLJ 2217. In *Kuching Pharmacy*, Haidar J premised his finding on the following grounds:

> In the light of the above cases, it seems to me a sensible interpretation can well be put upon O 55 r 2(1) of the RHC. The said provision can be interpreted, so as to do justice, by inserting the words 'or within six weeks from the receipt of the notification referred to in O 49 r 3A sub-r 3 of the Subordinate Court Rules 1980, as the case may be', after the words 'O 49 r 3 sub-r(2)' in O 55 r 2(1) of the RHC. If those words are inserted, it means that the appellant who is represented will have six weeks to file the memorandum of appeal in line with the period prescribed under O 49 r 3A(3) of the SCR where the appellant who is represented will have to file the record of appeal as well. My view is further fortified by O 55 r 2(2) which requires the appellant within the like period to serve each respondent with a copy of such memorandum and a copy of the appeal record. If the words suggested are not inserted therein, we are not giving effect to the provisions in O 55 rr 3 and 4 of the RHC, thereby giving rise to an absurd and unjust situation. The requirement of the appellant to file the memorandum of appeal is further supported by a similar provision under r 62(1) of the Rules of the Supreme Court 1980 in respect of appeal from the High Court to the Supreme Court. The object of the necessity of the memorandum of appeal is obvious so that the respondent and the appellate court will know the grounds of objection to the decision appealed against and that no party is caught by surprise. My view is fortified if we look at the provisions under rr 3 and 4 of the RHC regarding cross-appeal by a respondent and the amendment. In my view, by inserting those words, everything fits together. Such a construction will 'provide the general legislative purpose' underlying the provision so as to do what the Rules Committee would have done, had they had the situation in mind.

Vohrah J (as he then was) in *Shafie bin Ahmad* did not give any reason why he agreed with the stand taken by Haidar J.

[8] The other side of the divide are the cases of *Elayachee v Woo Siu Tip* [1991] 3 MLJ 108 and *Hj Abdul Ghani bin Kesah v Tuan Ahmad bin Tuan Man* [1990] 3 MLJ 45 which held that the memorandum of appeal must be filed within 14 days from the receipt of Form 141. Taking the latter case first there, Lamin J (as he then was) in so holding reasoned as follows:

> As I have said earlier that there is only one solitary provision in the rules that regulates the filing of the memorandum of appeal and that is found in r 2(1) of O 55 RHC 1980. Now, the thrust of this provision is to lay down the policy of the 14-day rule by which the memorandum of appeal is to be filed. Before the introduction of r 3A, this 14-day rule was made applicable to both the unrepresented appellant and the appellant represented by counsel. This provision has not been amended and there is not a hint anywhere even impliedly that this policy of the 14-day rule is to be abandoned or to operate against an appellant represented with counsel. There is no valid reason for it not to be retained. There is also no valid reason why he must be given more time than an appellant without counsel. So I am of the view that upon service of the notification under sub-r (3) of rule 3A, he will have 14 days within which he is to approach the court for the notes of evidence and to file his memorandum of appeal. For practical convenience, in the same notification he can be informed of two things, namely, he is given six weeks to file his appeal record and 14 days to file his memorandum of appeal.

[9] In Elayachee, Fiusoff Chin J (as he then was) had the benefit of considering both the decisions by Haidar J and Lamin J in the cases cited above. Eusoff Chin J discussed at length O 49 r 3(1) of the SCR as amended by PU(A) 462/90 and summarised the position as follows:

> ... a memorandum of appeal does not form part of the appeal record. Therefore, the period of six weeks under O 49 r 3A(3) of the SCR, which applies to the filing of appeal record, cannot be applied to the period within which to file the memorandum of appeal.
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> Order 55 r 2(1) of the RHC specifically deals with the memorandum of appeal. The memorandum must be in Form 113 A found in the list of forms in the RHC. The memorandum must be filed in the High Court in duplicate. The period stated by this rule within which the memorandum of appeal is to be filed, is 14 days from the service of Form 141 by the subordinate courts on the appellant or his counsel. To hold that six weeks should be the period within which to file the memorandum of appeal in a case where the appellant is represented by counsel would lead to absurdity because even an unrepresented appellant is given only 14 days from the service of Form 141 to file his memorandum of appeal to the High Court.

And further down, he observed:

> Order 55 r 4(3) of the RHC states that where a memorandum of appeal is not filed within the prescribed time, and no sufficient ground is shown for the delay, the appeal must be dismissed.

[10] Having examined O 49 rr 3 and 3A of the SCR and O 55 r2(1) of the RHC, we prefer the view expressed by Lamin and Eusoff Chin JJ to that of Haidar J. On that premise, we agree with the learned High Court judge that O 55 r 2(1) of the RHC on its proper construction admits of no ambiguity as contended by learned counsel for the appellants.

[11] In any event in the present case, we do not think that the delay in filing the second memorandum of appeal could in any way be attributed to the alleged ambiguity. The second memorandum of appeal was filed way pass the six week period prescribed for the filing of the appeal record. The error on the part of the appellants' former solicitors is not in filing the memorandum of appeal out of time but rather for incorporating the memorandum of appeal in the appeal record. And by the time the solicitors realised the error, six months had elapsed from the time of service of Form 141. The second memorandum of appeal was then filed. As we see it, this delay in filing the memorandum of appeal has got nothing to do with the alleged ambiguity in O 49 rr 3 and 3A of the SCR or O 55 r 2(1) of the RHC. It arose purely out of the mistake of the appellants' solicitors in failing to file the memorandum of appeal separately from the appeal record as required by the rules.

[12] The next question is whether the court has a discretion to extend the time. In considering the question, the learned High Court judge referred to the original O 55 r 2 of the RHC and the current one. The former reads as follows:

> 2(1) The appellant shall, within fourteen days from the date of service on him of the notice referred to in O 49, r 3 sub-r (2) of the Subordinate Courts Rules, 1980 or *within such extended time as the High Court may allow*, file in the High Court in duplicate a memorandum of appeal in Form 113A.
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> (Emphasis added.)

The present provision of O 55 r 2(1) reads as follows:

> 2(1) The appellant *shall*, within fourteen days from the date of service on him of the notice in Form 141 under O 49, r 2 sub-r (4) or r 3 sub-r (2) of the Subordinate Courts Rules 1980 (as the case may be), file in the High Court in duplicate a memorandum of appeal in Form 113A.
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> (Emphasis added.)

[13] She held that since the Rules Committee had removed the words 'or within such extended time as the court may allow' appearing in the original rule, therefore, the 14 days prescribed under the present provision is a mandatory provision and has to be strictly complied with. With respect to the learned High Court judge, we do not think that the deletion of those words would deprive the court of its discretion to extend time, for such a discretion is expressly conferred by O 3 r 5(1) of the RHC which deals with extension or abridgment of time specified in the rules. On that premise, we hold that under the present provision of O 55 r 2(1) of the RHC, the court still has the discretion to extend the time prescribed therein.

[14] Having held that the court has a discretion to extend the time, the next issue to be considered is whether the learned High Court judge in the circumstances had properly exercised her discretion in dismissing the application. Relying on the Federal Court decision in *Gan Hay Chong v Siow Kian Yuh & Anor* [1975] 2 MLJ 129, the learned High Court judge held that ignorance of procedural law does not constitute a sufficient ground upon which the court could exercise its discretion to enlarge time. However, after reading the judgment of the Federal Court, we agree with the learned counsel for the appellants that the Federal Court did not lay down the general rule that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal. In that case, the Federal Court, however, did not exercise their discretion in favour of the appellant on the particular facts of the case. This is clear from the following excerpt of the judgment of the court which reads:

> Since the learned trial judge had, with regret, proceeded on a wrong principle, it behoves us, sitting on appeal, to examine whether the facts merit the exercise of judicial discretion in favour of the appellant. On the facts as disclosed, it does not appear possible to challenge Mr Atma Singh's contention that he had read the 14 day period in r 2(5) of O XXXIX Subordinate Court Rules to run from the date of service of the appeal record on him and not from the service of the notice that the appeal record was ready but he was advised well within time by a letter dated 28 May 1973 from the solicitors for the respondents of the requirement in O 59 r 2(1) and (2) of the Rules of the Supreme Court and he could not really contend that he remained in ignorance of this rule. He would or should have been disabused of his earlier mistake by this later advice.
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> I feel fairly confident that if the learned trial judge had applied the right principle to the facts, he would have come to the same conclusion and refused leave.

In the circumstances, we find that the learned High Court judge had acted on a wrong principle. Therefore, it behoves us to consider whether there is sufficient material before us to merit the exercise of the discretion in favour of the appellants.

[15] In the present case, the solicitors for the appellants had committed two mistakes: firstly, in incorporating the memorandum of appeal into the appeal record and secondly, in filing the memorandum of appeal outside the 14 day time frame as prescribed by O 55 r 2(1) of the RHC. Having realised their mistakes, the solicitors then filed a separate memorandum of appeal on 8 October 1998, which is 6 months outside the time prescribed and no application for extension of time was made at that stage. The application for extension of time was only filed on 25 May 1999 after the respondent's solicitors gave notice of preliminary objection on 14 December 1998.

[16] From the above, it is clear that the non-compliance was due to the mistake of the former solicitors of the appellants and the appellants are not at all to blame. In any event, the memorandum of appeal had been filed earlier together with the appeal record. Therefore, the respondent have had notice of the grounds upon which the appellants are relying in the appeal. The same memorandum of appeal was filed again on 8 October 1998. In the circumstances, the respondent could not be said to have been seriously prejudiced by the non-compliance of the rule.

[17] The learned counsel for the appellants also seeks to rely on the case of *Lee Guat Eng v Tan Lian Kim* [1985] 2 MLJ 196 where the Supreme Court following *Ratnam v Cumarasamy* held that the court has a wide discretion in granting or refusing extension of time under O 55 r 4(3) of the RHC. At p 196, the Supreme Court observed:

> Order 3 r 5 of the Rules of the High Court 1980 gives the court discretion to extend time. The court may extend or abridge the period within which a person is required by the rules to do any act on such terms as the court may think just. The word 'just' would appear to enable the court to neutralise the rigidity of the rules in appropriate cases. I would rather that we look at it as Lord Guest said in *Ratnam v Cumarasamy* that adherence to the rules are merely to provide a 'time-table for the conduct of litigation.' The rules should not be used to shut out litigants in every case of non-compliance.

The application for extension of time in *Lee Guat Eng* was granted by the Supreme Court on the ground, inter alia, that the application there was only for extension of time to serve the memorandum of appeal and the appeal record on the respondent whereas the filing in court of the same had been done well within the prescribed time.

[18] The appellants further seek to rely on the decision of this court in *Md Amin Md Yusof & Satu Lagi lwn Cityvilla Sdn Bhd* [2004] 4 MLJ 446. In that case, there was failure to file the appeal record and after a delay of 21 months, the application for extension of time was filed. The court allowed the application on the grounds that the delay in filing the appeal record would not prejudice the merit of the application as there was sufficient and reasonable explanation given for the delay. The court further found that the delay was due to the fault of the former solicitors of the appellants and the appellants were not to be blamed.

[19] As against the cases cited above, we have the case of *Alloy Automative Sdn Bhd v Enkei Automative Co Ltd & Anor* [1997] 3 MLJ 205. In that case, the respondents commenced an action seeking a declaration as to a certain trade mark against the appellant. In the absence of the appellant or its solicitors, the judge granted the respondents the order in terms of their application. The appellant applied for the order to be set aside but this was refused by the court. The appellant appealed. In appealing against the court's order, the appellant failed to file its memorandum and record of appeal — the reason for not having done so was said to be the mistake of the appellant's former solicitors. The appellant applied for extension of time to file and serve its memorandum and record of appeal.

[20] In dismissing the appeal, this court held that from the facts of the case, it was clear that the appellant's solicitors had blatantly disregarded court procedure in failing to file the memorandum and record of appeal within the required time. The appellant was also partially to blame for the delay and the appellant should have been more vigilant as to the state of its pending matter and should have checked on its solicitors' actions. Furthermore, the court held that the appellant's claim was, on its merits, heard and dismissed by two High Court judges.

[21] In the present case, the application is only for extension of time to file and serve the memorandum of appeal. The appeal record had been filed earlier within the stipulated time. Even the memorandum of appeal had been filed earlier together with the appeal record, albeit erroneously. After realising the error, the appellants' solicitors filed the memorandum of appeal out of time and this application, even though made after the notice of preliminary objection, was merely to regularise the filing and service of the memorandum of appeal. In the circumstances, we do not think that the conduct of the appellants' solicitors could be regarded as a blatant disregard of the rules of court. There was indeed a misapprehension of the rules of court but remedial steps were taken to comply with the rules. As stated by this court in *Thiruchelvasegaram a/l Manickavasegar v Mahadevi a/p Nadchatiram* [1998] 4 MLJ 297, the primary consideration in exercising discretion to extend time is whether the party can clearly demonstrate that there was no intention to ignore or flout the order and that the failure to obey was due to extraneous circumstances.

[22] Further, we are of the view that there are merits in this appeal. Here, the learned judge had awarded a sum of RM66,250 as general damages for wrongful termination against the first appellant and also a sum of RM100,000 as aggravated damages for defamation against both appellants. The issue is whether the respondent is entitled to damages both for wrongful dismissal and for defamation at the same time. Also, the appellants had contended that there is merit in the appeal at least on the quantum of damages awarded for defamation in the light of the recent decisions of this court (see *Karpal Singh Ram Singh v DP Vijandran* [2001] 4 MLJ 161; *Liew Yew Tiam & Ors v Cheah Cheng Hoc & Ors* [2001] 2 CLJ 385; *Joceline Tan Poh Choo & Ors v V Muthusamy* [2003] 4 MLJ 494).

[23] For the reasons given above, we hold that the learned High Court judge, in coming to her decision, had acted on a wrong principle and had she applied the correct principle to the facts of the present case, she would have arrived at a different

conclusion. Accordingly, we allow the appeal by the appellants and grant the appellants the extension of time from 23 April 1998 to 8 October 1998 to file and serve the memorandum of appeal dated 18 May 1998. We make no order as to costs both here and in the court below. The deposit is to be refunded to the appellants. Consequently the matter is remitted to the High Court to be heard on the merit.

Appellant's appeal allowed.

Reported by Loo Lai Mee